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IN THE COURT OF APPEAL OF THE STATE OF
CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

HENRY J. TASHMAN,

Plaintiff and Appellant,

v.

DAVIS WRIGHT TREMAINE
LLP,

Defendant and Respondent.

B291799

(Los Angeles County
Super. Ct. No. BC587380)

APPEAL from a judgment of the Superior Court of Los Angeles County, Susan Bryant-Deason, Judge. Affirmed.

Henry J. Tashman, in pro. per.; Leonard, Dicker & Schreiber and Richard C. Leonard for Plaintiff and Appellant.

Long & Levit, Joseph P. McMonigle and John B. Sullivan; Byrnes Keller Cromwell, Bradley S. Keller and Joshua B. Selig for Defendant and Respondent.

INTRODUCTION

Appellant Henry Tashman, an attorney, sued his former law firm, respondent Davis Wright Tremaine LLP, asserting various causes of action in connection with a settlement agreement between the parties. When respondent moved to compel arbitration under a dispute-resolution provision in the agreement, appellant claimed that provision was unenforceable because respondent had fraudulently induced it. The trial court granted the motion to compel arbitration and, following the arbitration, confirmed the award for respondent.

On appeal, appellant challenges the order compelling arbitration, arguing the court failed to consider his fraudulent inducement claim. He also contends the court abused its discretion in denying him leave to amend his complaint. Rejecting these contentions, we affirm.

BACKGROUND

A. The Parties and the Settlement Agreement

Respondent is a national law firm with offices across the United States. Before the dispute between the parties arose, appellant, an experienced commercial litigator, was an equity partner, in the firm leading a successful practice at its Los Angeles office. By 2012, however, the relationship between the parties had soured. Appellant's compensation had dropped considerably in the preceding years. Appellant attributed his declining compensation to unfair treatment and a decision by respondent to force him out of the firm in

retaliation for his opposition to alleged ethical violations. In contrast, respondent attributed the decline to appellant's diminished productivity. According to respondent, appellant threatened to sue based on his allegations of unfair treatment.

In August 2012, after several months of negotiations, the parties reached a settlement agreement including a mutual release of claims. During the final stages of the negotiations, appellant was represented by an attorney. Under the settlement agreement, appellant would become a non-equity partner and remain at the firm for two years. During those two years, appellant would chair a new practice group, receive a guaranteed yearly compensation of \$200,000, and retain eligibility for annual bonuses. Respondent was required to support his practice in various ways. If after two years, appellant was profitable, as defined by the settlement agreement, respondent would renew the agreement for additional one-year periods on the same terms. If appellant was not profitable, however, respondent would not renew the agreement, and appellant would be deemed to have "withdrawn" from the firm.

The settlement agreement also included a dispute-resolution provision: "Any dispute . . . involving the relationship between [appellant] and [respondent] . . . shall be resolved pursuant to the terms of Article XIV of the [firm's 2009] Partnership Agreement." In turn, the relevant provision of the 2009 partnership agreement provided for binding arbitration of disputes between respondent and any

partner, to take place in Seattle, Washington. During the negotiations, appellant sought changes to the dispute-resolution provision. He requested that any arbitration take place in Los Angeles and be governed by California law, and that the prevailing party be entitled to attorney fees. Respondent rejected these proposed terms.

At the end of the two-year period, appellant had billed a total of 182 hours, and respondent decided not to renew the settlement agreement, thereby ending appellant's professional relationship with the firm.

B. The Lawsuit and the Motion to Compel Arbitration

In 2015, appellant filed this action against respondent, asserting causes of action for breach of contract, breach of fiduciary duty, and fraud. Respondent promptly moved to compel arbitration under the settlement agreement's dispute-resolution provision.

After conducting limited discovery, appellant filed an opposition to respondent's motion. In his opposition, appellant argued primarily that the dispute-resolution provision was unconscionable. As part of this argument, appellant claimed the 2009 partnership agreement referenced in the settlement agreement had not been properly executed, and thus its arbitration provision was "never in effect." He contended a 2003 partnership agreement was the operative partnership agreement, and noted the 2003 agreement did not require arbitration of the claims in his complaint. Finally, appellant asserted, in a

conclusory fashion, that “the [dispute-resolution] provision was fraudulently induced.”

In March 2016, the trial court held a hearing on respondent’s motion to compel arbitration. At the start of the hearing, the court announced its tentative ruling, granting the motion and addressing the main arguments raised by appellant in his opposition. According to the tentative ruling, the dispute-resolution provision was not unconscionable, and its incorporation of the 2009 partnership agreement’s arbitration provision was valid even if that agreement was invalid.

Addressing the court, appellant’s counsel then focused on the claim of fraud in the inducement of the dispute-resolution provision, briefly mentioned in appellant’s opposition. Counsel argued appellant had agreed to this provision “based on a representation that he had [a pre-existing] obligation to arbitrate . . . based on the 2009 partnership agreement.” After allowing counsel to argue this position at length, the trial court stated: “Counsel, I’m sorry, but I really disagree with you. I feel that he’s a 30-year lawyer who was assisted by another extremely distinguished lawyer They had an opportunity to look at all of this. . . . They had an opportunity to ask questions. They went back and forth And he made a decision. And he signed it.” Counsel then reiterated the contention that appellant’s decision was induced by respondent’s fraud, to which court replied: “You will have to take that up in another forum because I’m adopting my tentative ruling.”

Following the court's ruling, appellant's counsel requested leave to amend the complaint by adding a claim of fraud in the inducement of the dispute-resolution provision. Respondent's counsel objected: "Your Honor, that's before you, the fraud in the inducement. That was actually presented and briefed, and that's the issue before you today." The trial court agreed: "That is. . . . And you've had the opportunity to lay out all of your arguments, which you have. And you have now argued it. And you have argued it at length. And I'm sorry. The court just simply does not agree with you."

At the conclusion of the hearing, the trial court dismissed the case without prejudice. The court later entered a minute order tracking the language of its adopted tentative ruling. Though not expressly addressing appellant's argument that respondent fraudulently induced the dispute-resolution provision, the order stated the court concluded "the issue of arbitrability rest[ed] with [the] court" and "the entirety of [appellant's] claims . . . f[e]ll within the scope of the arbitration provision."

C. The Writ Petition and the Arbitration

Appellant petitioned for a writ of mandate, seeking to overturn the trial court's ruling.¹ In his petition, appellant reiterated his contention that respondent fraudulently

¹ We take judicial notice of appellant's petition for a writ of mandate. (Evid. Code, § 452, subd. (d).)

induced the dispute-resolution provision and argued the trial court had failed to consider this claim. He explained he requested leave to amend his complaint “in order to make it clear that he wanted the [trial] court to rule on the issue of fraud in the inducement of the [dispute-resolution] provision” Division One summarily denied appellant’s petition.

The parties proceeded to arbitration, in which appellant sought only a declaration that the dispute-resolution provision was unenforceable because respondent had procured it by fraud. Respondent asserted a collateral estoppel defense, claiming the trial court has already ruled on this issue. Appellant then moved to dismiss that defense, again asserting the court had not ruled on his claim. The arbitrators subsequently granted appellant’s motion after failing to ascertain whether the court had ruled on the fraudulent-inducement claim. In response to the arbitrator’s decision, respondent moved the trial court for an order clarifying its prior ruling. Appellant objected that the court lacked jurisdiction to clarify its prior ruling and filed an application to strike respondent’s motion for clarification. Ruling on appellant’s application, the court stated it “defers to the arbitration panel . . . and refers [it] to the extensive argument as set forth in the court reporter transcript” of the hearing on respondent’s motion to compel arbitration.

The arbitrators proceeded to consider appellant’s fraudulent-inducement claim and ultimately rejected it, issuing a monetary award for respondent relating to payment of arbitrator fees. On respondent’s petition, the

trial court confirmed the award. Appellant then filed this appeal, challenging the court's grant of respondent's motion to compel arbitration.²

DISCUSSION

A. The Trial Court's Ruling on the Motion to Compel Arbitration

Appellant challenges the trial court's order compelling arbitration. He argues the trial court erred by refusing to consider his argument that respondent had fraudulently induced the dispute-resolution provision in the parties' settlement agreement. Appellant does not challenge the merits of the trial court's decision but rests on his assertion the court failed to consider his claim altogether.³

² “[A] party compelled to arbitrate is entitled to have the validity of the order reviewed on his appeal from a judgment confirming an award.” (*State Farm Fire & Casualty v. Hardin* (1989) 211 Cal.App.3d 501, 506.)

³ At oral argument, appellant appeared to suggest that the trial court was required to hold an evidentiary hearing on his fraudulent-inducement claim. However, he never asked the court to hold such a hearing or otherwise sought to submit additional evidence. Moreover, in his briefs on appeal, appellant argues only that the court failed to rule on his claim; he disclaims a challenge to the manner in which the trial court reached any ruling. Appellant has therefore forfeited any contention in this regard. (See *Morgan v. Imperial Irrigation Dist.* (2014) 223 Cal.App.4th 892, 913 [“As a general rule, an appellate court will not review an issue that was not raised by some proper method by a party in the trial court”]; *Haight Ashbury Free Clinics, Inc. v.* (Fn. is continued on the next page.)

Respondent contends, and appellant does not dispute, that the Federal Arbitration Act (FAA; 9 U.S.C § 2 et seq.) governs the dispute-resolution provision. “The FAA reflects the fundamental principle that arbitration is a matter of contract.” (*Rent-A-Center, West, Inc. v. Jackson* (2010) 561 U.S. 63, 67 (*Rent-A-Center*)). The United States Supreme Court has acknowledged that “[a] prime objective of an agreement to arbitrate is to achieve ‘streamlined proceedings and expeditious results.’” (*Preston v. Ferrer* (2008) 552 U.S. 346, 357.) Consistent with that objective, section 2 of the FAA provides: “A written provision in . . . a contract . . . to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” (9 U.S.C § 2.) “The FAA thereby places arbitration agreements on an equal footing with other contracts, [citation], and requires courts to enforce them according to their terms, [citation]. Like other contracts, however, they may be invalidated by ‘generally applicable contract defenses, such as fraud, duress, or unconscionability.’” (*Rent-A-Center, supra*, at pp. 67-68.)

As a general matter, “a gateway dispute about whether the parties are bound by a given arbitration clause raises a ‘question of arbitrability’ for a court to decide.” (*Howsam v.*

Happening House Ventures (2010) 184 Cal.App.4th 1539, 1554, fn. 9 [“We do not consider arguments that are raised for the first time at oral argument”].)

Dean Witter Reynolds, Inc. (2002) 537 U.S. 79, 84.) “In California, [g]eneral principles of contract law determine whether the parties have entered a binding agreement to arbitrate.” (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236.) Because appellant does not challenge the trial court’s factual findings, we review the court’s ruling on respondent’s motion to compel arbitration de novo. (See *Laymon v. J. Rockcliff, Inc.* (2017) 12 Cal.App.5th 812, 819 [absent factual dispute on language of arbitration agreement or terms of contract, review of trial court’s ruling on motion to compel arbitration is de novo].)

We agree that the trial court was tasked with deciding appellant’s fraudulent-inducement claim.⁴ (See *Howsam v. Dean Witter Reynolds, Inc.*, *supra*, 537 U.S. at p. 84.) However, we reject appellant’s contention that the trial court failed to rule on his claim, as the record confirms the court both considered and rejected it.

Appellant’s counsel made the assertion that respondent fraudulently induced the dispute-resolution provision during

⁴ “Fraud is one of the grounds on which a contract can be rescinded.” (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 973.) “The elements of fraud are (a) a misrepresentation (false representation, concealment, or nondisclosure); (b) scienter or knowledge of its falsity; (c) intent to induce reliance; (d) justifiable reliance; and (e) resulting damage.” (*Hinesley v. Oakshade Town Center* (2005) 135 Cal.App.4th 289, 294.)

the hearing on respondent's motion to compel arbitration. The trial court responded it "really disagree[d]" with counsel and, suggesting appellant lacked justifiable reliance, noted that appellant was "a 30-year lawyer who was assisted by another extremely distinguished lawyer" and had had ample opportunity to investigate the validity of the 2009 partnership agreement. After appellant's counsel requested leave to amend the complaint to add a claim of fraud in the inducement of the dispute-resolution provision, respondent's counsel addressed the court: "Your Honor, that's before you, the fraud in the inducement. That was actually presented . . . , and that's the issue before you today." The court replied: "That is. . . . And I'm sorry. The court just simply does not agree with [appellant]."

In support of his position the trial court nevertheless failed to consider his claim of fraud in the inducement of the dispute-resolution provision, appellant points to the court's minute order. He notes the order did not explicitly address the issue, and argues this omission shows the court erroneously left his arbitrability challenge based on fraud in the inducement to the arbitrators. But the trial court's order made clear that the court recognized "the issue of arbitrability rest[ed] with [the] court."

Appellant also seizes upon the court's statement at the hearing that he would "have to take [his claim] up in another forum" He suggests the court meant he could only raise his argument in the arbitration. We disagree. Given the trial court's recognition it was tasked with deciding

arbitrability and its response to appellant's argument about the dispute-resolution provision, the other forum the court had in mind was likely the Court of Appeal.

The court's statements at the hearing and its minute ruling leave no doubt it considered and rejected appellant's claim of fraud in the inducement.⁵ We perceive no error in the trial court's ruling.

B. The Trial Court's Denial of Leave to Amend

Next, appellant claims the trial court abused its discretion in denying him leave to amend his complaint. Under Code of Civil Procedure section 473, subdivision (a)(1), the trial court may allow the amendment of any pleading "in furtherance of justice." "An application to amend a pleading is addressed to the trial judge's sound discretion. [Citation.] On appeal the trial court's ruling will

⁵ For the first time at oral argument, appellant pointed to the trial court's ruling on his application to strike respondent's motion for clarification as evidence that the court never ruled on his claim of fraud in the inducement. The trial court refused to clarify its order and instead stated it "defers to the arbitration panel . . . and refers [it] to the extensive argument" at the hearing on respondent's motion to compel arbitration. Appellant has forfeited any argument in this regard by failing to include it in his briefs. (See *Haight Ashbury Free Clinics, Inc. v. Happening House Ventures, supra*, 184 Cal.App.4th at p. 1554, fn. 9.) Moreover, as discussed, the colloquy between the court and the parties at the referenced hearing shows the court did, in fact, rule on appellant's claim.

be upheld unless a manifest or gross abuse of discretion is shown. [Citations.] The burden is on the plaintiff to demonstrate that the trial court abused its discretion.” (*Sullivan v. City of Sacramento* (1987) 190 Cal.App.3d 1070, 1081.)

“California courts have ‘a policy of great liberality in allowing amendments at any stage of the proceeding so as to dispose of cases upon their substantial merits where the authorization does not prejudice the substantial rights of others.’” (*Douglas v. Superior Court* (1989) 215 Cal.App.3d 155, 158 (*Douglas*).) Nevertheless, leave to amend should not be granted where the amendment would be futile. (*Ivanoff v. Bank of America, N.A.* (2017) 9 Cal.App.5th 719, 726 (*Ivanoff*).)

As noted, appellant sought to add a cause of action for fraud based on his claim that respondent fraudulently induced his agreement to the dispute-resolution provision. Appellant argues that in light of the policy of liberality in permitting amendments, the court’s denial of leave was an abuse of discretion. We disagree.

Although appellant ostensibly sought to assert a new cause of action, he has clarified that the amendment was merely an alternative procedural means to challenge the enforceability of the dispute-resolution provision. For instance, his petition for a writ of mandate stated he sought the amendment “in order to make it clear that he wanted the court to rule on the issue of fraud in the inducement of the [dispute-resolution] provision” Similarly, in his opening

brief, appellant states: “[The court’s denial of leave to amend] ignored the fact that [he] was not challenging his execution of the Settlement Agreement or its overall enforceability; he was challenging the enforceability of the dispute resolution [provision]”

Given that the court had already rejected this challenge on the merits -- a decision he does not challenge on appeal -- appellant’s proposed amendment would have been futile, and therefore inappropriate. (See *Ivanoff, supra*, 9 Cal.App.5th at p. 726.) The court’s rejection of appellant’s claim on the merits also meant the primary rationale for the liberal allowance of amendments -- ensuring that cases are heard on the merits (see *Douglas, supra*, 215 Cal.App.3d at p. 158) -- was inapplicable. By contrast, granting appellant leave to amend would have caused undue delay and frustrated a “prime objective” of arbitration agreements, “to achieve ‘streamlined proceedings and expeditious results.’” (*Preston v. Ferrer, supra*, 552 U.S. at p. 357.) Accordingly, the court did not abuse its discretion in denying appellant leave to amend his complaint.

DISPOSITION

The judgment is affirmed. Respondent shall recover its costs.

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MANELLA, P. J.

We concur:

COLLINS, J.

CURREY, J.